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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

IN THE MATTER OF R.M.J.,

Appellant

On Appeal From The Supreme Court
of Missouri

BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF APPELLANT

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STATEMENT OF THE CASE

This is a lawyer's appeal from a disciplinary proceeding in which the Supreme Court of Missouri imposed a private reprimand and sustained all four Counts of a disciplinary Information. 609 S.W.2d 411.

Appellant was charged by the Advisory Committee of the Missouri Bar with four separate violations of Rule 4 of the Missouri Court, its Code of Professional Responsibility. All were violations of the Disciplinary Rules concerning lawyers' advertising, particularly DR 2-101(B), respecting advertising in the printed media, and DR 2-102(A)(2), respecting professional announcements. The Rules in question are those adopted, or reaffirmed, by the Missouri Court "to implement the teachings" of this

Court's Bates decision, in 1977. 609 S.W.2d 412.

One of the Rules allegedly violated, DR 2-101(B)(2), gives the Missouri Court's disciplinary sanction to an "Addendum" promulgated by the bar Advisory Committee pursuant thereto. That potentially beneficient, flexible method of regulation seems to have been made the vehicle for excessively restrictive substantive regulation, and it is the substance, not the method, that is challenged here.

The four Counts against Appellant were the subject of a brief hearing before the Advisory Committee, which produced a Stipulation that constitutes the entire factual record.

Count I is based upon an advertisement published in a local newspaper in the St. Louis suburbs, the West End Word. The advertisement was placed before the Addendum was published, although it appeared after the new Rules and Addendum became effective on January 1, 1978.

Count II involves a substantially identical advertisement placed in a 1978 suburban St. Louis yellow pages directory. It also was placed before the Addendum became public.

Count III charges the mailing of "professional announcement cards," entirely proper in form, to persons not personally known to appellant, apparently associates of his wife. This is the only Count under DR 2-102 rather than DR 2-101.

Count IV involves an advertisement in a later yellow pages directory, that for Greater St. Louis, which cir-

culates in Illinois as well as in Missouri. (Appellant is licensed in both states.) The advertisement was modified from those involved in Counts I and II only in that it contained a disclaimer of certification of expertise in the areas of practice listed, required by the Addendum.

None of the Counts includes any allegation that appellant's publicity included a false or misleading statement or implication. The specific grounds of the charges are described in the relevant portions of the Argument below.

Appellant's careful and respectful constitutional objections to the charges against him were disregarded by the Missouri Court, which imposed minimal discipline because it saw this as "a 'test' case" involving minimal violations of its disciplinary code. 609 S.W.2d at 412. This Court noted probable jurisdiction on June 1, 1981.

STATEMENT OF INTEREST

The Association of Trial Lawyers of America is a voluntary, nationwide organization of over 40,000 members, including several hundred in Canada and other foreign countries. Its membership includes judges and law teachers, but primarily consists of lawyers who specialize in litigation, and particularly in the representation of plaintiffs in civil cases involving injuries and death to people and damage to property.

The nature of its members' practice gives the Association a strong interest in striking down restraints on

what lawyers may truthfully say about what they do. The Association was most recently an amicus in this Court last term, in Gulf Oil Co. v. Bernard, No. 80-441, ____ U.S.____, supporting the right of the lawyers for a class-action plaintiff to communicate freely with other members of the class.

The typical member of the Association has few, if any, institutional clients. His or her clients are mostly one-time users of the court system, whose need for legal services arises from the traumatic experience of serious injury, loss of property, or the sudden death of a bread-winner. These are people in need of help, sometimes aptly called the victims of modern industrialized society. Recent surveys indicate that many of them do not use lawyers because they cannot identify the kind of lawyer they need, because of the type of limitation on what lawyers may try to communicate to them that is involved in this case.

Because of such limitations, such people are often unable to assert their legal rights. They are deprived not only of their right to receive information under the First Amendment, but also of their right to effective counsel, guaranteed by the Fifth and Sixth Amendments.

The Association thus appears here out of a deeply felt enlightened self-interest, seeking to vindicate the right of the prospective clients of its members to receive information that will be useful to them in obtaining and selecting counsel.

The Association is also directly interested in this

case because the appellant is a member of the Association. That fact was disclosed to the Association Amicus Curiae Committee that authorized the filing of this brief. The Committee's action was not, however, sought by the appellant, but by Association officials whose interest in the case was unrelated to appellant's Association membership.

SUMMARY OF ARGUMENT

This appeal involves the constitutionality of two Disciplinary Rules of the Supreme Court of Missouri regulating advertising by Missouri lawyers, and of an Addendum to one of those Rules, adopted by the Advisory Committee of The Missouri Bar. Both the Rules and the Addendum appear calculated not to regulate lawyers' advertising, so much as to prevent it. The disciplinary proceeding which led to this appeal suggests that the bar authorities of Missouri want the clock turned back to the time when new lawyers in town could not compete for consumers' legal business by advertising the availability of their services. Both the provisions under review, and the Missouri Court's opinion upholding them, demonstrate an unwillingness to adapt to the new era initiated by this Court's Bates decision of 1977.

Missouri's lawyer-advertising rules are overly broad prohibitions, because they authorize so narrow a spectrum of expression. The Rules put a straight jacket on lawyer's communications with the public, and thus restrict not only

the exercise of lawyers' First Amendment rights of commercial speech, but also the prospective client's access to the effective assistance of counsel. Missouri lawyers are allowed to advertise, but not to advertise effectively. There is nothing about the appellant's conduct that suggests an intent to overreach, or to mislead, prospective clients. He is being disciplined for essentially petty mala prohibita, and for violating prohibitions that have little or no relationship to the purported purpose of protecting the public. Those prohibitions infringe the right of every potential client in Missouri to receive useful information about legal services, and should be struck down.

ARGUMENT

MISSOURI'S RESTRICTIONS ON TRUTHFUL LAWYERS' ADVERTISING EXCEED THE STATE'S NEED TO REGULATE SUCH COMMERCIAL SPEECH, AND INFRINGE ON THE EXERCISE OF THE RIGHT TO COUNSEL.

This case raises four issues or sets of issues:

1. Whether a state may prohibit its lawyers from mailing routine, dignified professional announcements except to persons with whom they are personally acquainted, or to whom they are related. (Count III.)

2. Whether a state may prohibit a lawyer

from publicizing the fact that he or she has been admitted to practice in a court, or system of courts, admission to which is not common to all lawyers of the state. (Counts I, II, and IV.)

3. Whether a state may prohibit its lawyers from advertising describing the areas of law in which they practice, except in a form of words dictated by the state. (Counts I, II, and IV.)

4. Whether a state may require all its lawyers who wish to advertise the areas of law in which they particularly specialize or concentrate their practice, to include in each such advertisement a disclaimer of "certification of expertise" in a form dictated by the state. (Counts I and II.)

Those issues arise only obliquely from the judgment and opinion of the Missouri Court. That Court refused to rule on the constitutional validity of any of the ethical rules challenged by appellant, or even to decide whether, as a matter of state law, it would refuse to sustain some of the charges. It thus implicitly sustained all of the charges against appellant.

The Missouri Court also, however, imposed on appellant only a private reprimand. That is the most minimal of disciplinary sanctions, which suggests that the Missouri Court's judgment may be affirmed should this Court

determine that any one of the charges against appellant may be sustained. Those charges must, however, undergo a peculiarly searching scrutiny. They are obviously subject to the four-pronged test for state regulation of commercial speech, announced last year in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557. They should be examined particularly closely, moreover, because the commodity to which they relate is also constitutionally protected--the assistance of counsel, without which the right to petition for redress of grievances may often be an empty shell.

I. The Professional Announcement Count

All of Missouri's charges rest on two doctrines: first, that even political speech may be subjected to reasonable limitations as to time, place, and manner, and second, that commercial speech may be regulated by somewhat more draconian, prophylactic measures if the classification of speech that is prohibited is reasonably likely to deceive or mislead. The latter doctrine undergirds both Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), and Friedman v. Rogers, 440 U.S. 1 (1979), where the Court upheld Texas' ban on practicing optometry under trade names.

The charge here that most clearly depends on these doctrines is that based on appellant's mailing "tombstone" announcements, by first class mail, to persons with whom he was not personally acquainted. The Missouri Bar

apparently concedes, as it must, that appellant's announcement cards were proper as to content. The Bar does not allege that mailing the cards violated DR 2-102(A) in any way except the identity of the addressees. It is not even alleged that appellant's cards were not "in dignified form;" the text is so bland that it could apparently be published in a newspaper without violating even Missouri's version of DR 2-101.[1]

The gravamen of Count III is that appellant mailed the most innocuous of all forms of professional advertising to someone he did not know. The Stipulation suggests that most of the people who received the cards and did not know appellant, knew his wife. Whether they knew of appellant, without being personally acquainted, is not of record.

Appellant claims the right to mail such cards to anyone at all. It is difficult to imagine the state interest that is served by preventing him from doing so. The only purpose the prohibition apparently serves is to protect other lawyers from losing clients to appellant. The likelihood that so proper a communication could effect such a seduction would seem dim.

The rule is patently an archaic artifact of the British tradition that all barristers are gentlemen, who can subsist without charging for their services. It pro-

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[1] Appellant was not, however, charged with violating DR 2-103 by the mailing, on the theory that it was "advertising"not allowed by DR 2-101. See In re Ruffalo, 390 U.S. 544 (1968). Thus no such theory is before the Court.

scribes sending professional notices to anyone who is not reasonably likely to know of a lawyer's change in circumstances. The degree of consanguinity for "relatives" is not specified; nor does the Missouri Court tell us whether it allows notices to be sent to the relatives of one's spouse, but not to his or her "personal friends." That term also has a peculiarly subjective elasticity; it would penalize the fastidious lawyer, who differentiates between "friends" and mere "acquaintances," but not the glad-hander.

The rule also inherently discriminates against the sole practitioner, such as appellant, and in favor of the larger firm. It allows every member of the large firm to send notices to friends, relatives, and former clients, subtly reminding them of his or her existence, whenever the firm's personnel changes, or it opens new offices in new cities. It lets sole practitioners do so only when they establish their offices, move their offices, or change their telephone numbers. Its purpose and effect are both blatantly anti-competitive; it is intended to protect other members of the profession, not to protect the public.

There is no danger of overreaching by such communications as professional announcements. Indeed, the dangers of in-person solicitation, on which the Court relied in Ohralik, are mostly dissipated whenever the communication is written or printed, whether it is mailed, delivered by messenger, or published in a newspaper. There is no problem determining exactly what was said, or

in what tone of voice, or with what enticing or threatening pauses or gestures. The very communication itself is available for evaluation and analysis.

One may readily imagine situations in which a professional announcement card would be useful to a person who does not know the announcing lawyer. Many other tenants in the same office building or shopping center, or even near-by residents, might well be delighted at the prospect of having a lawyer next door, rather than downtown. Some of them would miss an advertisement in a local publication such as the West End Word, and few would consult the yellow pages without a present need for legal help. The rule prohibits appellant from making known to such people his presence among them, in a direct, ethical, and dignified way, unless he already knows them.

This case does not even involve a communication suggesting the need for legal services, such as the New York Court of Appeals authorized (reversing a lower court) in Matter of Koffler, 51 N.Y.2d 140, 412 N.E.2d 927 (1980), cert. denied, _____ U.S. _____, 101 S.Ct. 1773 (1981). We would urge that such communications must also be constitutionally protected, if accurate and not deceptive, lest commercial speech be permitted only when it is least likely to convey useful information to consumers.

The professional announcement card is a traditional, almost an ancient device of the legal profession. Such cards were allowed long before Bates. This case shows that the limitations placed on using such devices in prior

years, and eras, have to be reexamined in the light of Bates. Missouri's present DR 2-102(A)(2) underwent no substantial change after Bates; it appears in the 1969 Code of Professional Responsibility in all but identical form. Indeed, it remains philosophically unchanged from Canon 27 of the Canons of Professional Ethics, promulgated by the ABA in 1908, which said that:

> solicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations, is unprofessional.

See also Drinker, Legal Ethics, 210 ff. (1953). If Bates stands for anything, it is that "personal relations" are no longer regarded as a necessary warrant for publicizing one's professional availability.

Count III of the information cannot stand.

II. The Published Advertising Counts

The remaining counts raise two issues that are common to all three, and one set of issues that are common to Counts I and II, but not to Count IV (whether appellant may be disciplined for failing to include a disclaimer of expertise). We turn first to the issues raised by all three of appellant's published advertisements.

A. Listing Admissions to Courts

All three advertisements contain the words, "Lic-

ensed in Missouri and Illinois", and "Admitted to Practice Before the United States Supreme Court." These words were charged by the Advisory Committee to violate DR 2-101(B) because, in each instance, "said advertisement lists the courts in which [appellant] . . . is admitted to practice."

The breadth of this charge is significant. It does not, as Judge Seiler's dissenting opinion suggests, 609 S.W.2d 415, at 416, allow a differentiation between appellant's mentioning his Illinois license, and his stating the fact that he is admitted to practice before this Court. By its terms, the information charges that listing the courts in which one is admitted to practice is professional misconduct. Neither the rule nor the Information draws a line between an admission that is obviously significant, and one that has little intrinsic meaning. Both are tarred with the same indiscriminate brush.

We need not, in this instance, look to Central Hudson Gas & Electric. We can stop at Friedman v. Rogers, 440 U.S. 1 (1979), and the simpler test laid down there for prophylactic prohibitions on an entire class of commercial speech. There, this Court concluded that the use of trade names by a regulated profession may be forbidden, because the conclusion that trade names are likely to mislead consumers is not unreasonable. One finds that reasoning wholly inapplicable to the fact that a lawyer is licensed to practice before a court. That fact is often, as in this case, intrinsicly useful to a potential consumer of legal services. One can conceive of few

items quite as useful, to a reader of the bi-state area directory in Count IV, as the fact that a lawyer practices on both sides of the Mississippi. It tells me, for example, that I can get one-stop service to go after both the used-car dealer in East St. Louis who sold me the lemon, and the charlatan in Clayton who failed to fix its brakes. Indeed, Missouri's version of the Code of Professional Responsibility gives specific authority for one form of admission to practice, that to patent practice pursuant to 35 U.S.C. §31. DR 2-105(A)(1) allows lawyers so admitted to call themselves "patent lawyers." One looks in vain for a rational differentiation between Patent Lawyers and Illinois Lawyers, or even between the authority to practice before one specialized agency in Washington, and the authority to practice before this Court. St. Louis area consumers would seem equally unlikely to have business before either.

Missouri's 1978 Code omits the standard paragraph of the ABA's Model Code, DR 2-101(B)(4), allowing publication of the "Date and place of admission to the bar of state and federal courts." The Missouri Court has now interpreted that omission as forbidding any mention of the fact that one is admitted to any court. In conjunction with DR 2-105(A)(1), then, Missouri's DR 2-101(B) violates the Equal Protection clause. The combination of the two rules has no rational basis.

It is true that, as the Chief Justice has recently remarked, admission to this Court signifies little more than that a lawyer has avoided disbarment for five years.

If so, one must ask whether the Court's failure to exercise its inherent authority to regulate its bar should be visited upon appellant. One must also ask whether the fact that a lawyer is already able to litigate before this Court, or any other Court, is not simply an objective fact which may be useful to some consumers, and which therefore should not be deemed misleading because it is not as useful as some other facts.

We would go so far as to hold that any objective, verifiable fact that is not deemed tainted with deception should be constitutionally protected commercial speech. Missouri's DR 2-101(A) prohibits "any form of public communication ... containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." That language appears in that rule almost every state's disciplinary code. It should prove sufficient to prevent lawyers' advertising that, while not "false", fits one of the other adjectives.

That is not, however, Missouri's charge against appellant. To the Advisory Committee's Information, deception of the consumer is as irrelevant as the usefulness of the facts conveyed. The only question raised by the Information is whether Missouri may constitutionally prevent its citizens from knowing that some of its lawyers are also licensed to practice in the courts of other states, or in particular federal courts. In the context of Count IV, the question may even be whether Missouri may constitutionally allow its lawyers who are not admitted in Illinois to advertise in a bi-state directory in such a way

that consumers could be misled on that count, without allowing lawyers who can render service in both states to communicate that fact. The fact that no other state shares common borders with more states than Missouri (which has eight) gives ironic weight to the wrong-headedness of the rule. The fact that appellant is admitted in the neighboring state near his office makes the rule peculiarly a burden on interstate commerce, as to him; but it is manifestly a rule without reason in any event.

B. Using Unauthorized "Area of Practice" Designations

The second charge common to Counts I, II and IV is that each of Appellant's advertisements listed specific areas of practice not authorized by the Advisory Committee.

DR 2-101(B)(2) clearly delegated to the Advisory Committee the task of establishing "designations and definitions" for areas of practice. The Committee's list, Paragraph III of the Addendum, should be considered the Missouri Court's, as though it appeared in the Disciplinary Rule. As such, however, it fails to pass muster under Central Hudson, and also lacks the rational basis required by the Equal Protection Clause of the Fourteenth Amendment.

Both points are demonstrated by the Committee's own 1978 amendments, published in the Journal of the

Missouri Bar in January 1979. The Committee dropped "Criminal Law" as a "specific" area, because it was also a "general" area of practice under Paragraph III; it replaced "Tort Law" with "Negligence Law," and "Family Law" with "Domestic Relations Law." The changes demonstrate that the Addendum was slapped together without sufficient regard to the public interest to be served by area of practice listings, rather than the private interests of the profession being regulated. The terminology mandated by the Committee is lawyer's language, not language intended to assist a consumer of average intelligence and education. It thus fails the Central Hudson test at phase three; it does not "directly advance the governmental interest asserted," protecting the public from being misled, while providing access to useful information. The fourth question on the Central Hudson test, whether the requirement that only listed "designations" be used, without deviation, "is not more extensive than necessary," bespeaks its own answer.

There may be a place for such a state-imposed form of speech. As to lawyers' advertising, it might be appropriate for a state Court to authorize its State Bar to determine the headings to be used for a "Lawyers Guide" in the yellow pages, in which lawyers are listed under their areas of practice, and to promulgate such a list. Even so, the list should be explicitly made subject to amendments and additions, as Missouri's is not.

Lawyers' practices do not, however, fit into neatly labelled pigeonholes. Many lawyers develop peculiar

specialties that cut horizontally across any list of vertical categories. Some such specialties have ideological or political overtones, i.e. "Gay Rights" or "Sex Discrimination Law," raising another set of First Amendment concerns. See In re Primus, 436 U.S. 412 (1978). Others consist of pragmatic clusters of parts of other specialties, needed to provide full services to a particular trade or industry, such as handling the zoning, contract, leasing, and regulatory-board problems of restaurants, or of artists or sculptors.

We read Bates as holding that the availability of a legal service may be accurately advertised, and that, if the service is sufficiently routine to be offered at a price, that price may be advertised. A service less subject to simple calculations may be advertised at an hourly or daily rate, or, for that matter, without quoting any rate. Indeed, it seems an a fortiori matter that advertising without mentioning prices has the same constitutional protection as price advertising. Surely consumers with complex legal problems have the same right of access to information about legal services, as those with simple problems.

Appellant's advertisements use 24 area-of-practice designations that are more informative than the 23 authorized by the state bar. It would make more sense to discipline a lawyer using the Bar list, than one using his.

The state should not be able to proscribe any phrase that accurately describes a lawyer's practice. The consumer with a perfectly square legal problem needs to be

able to locate a perfectly square lawyer. The Sixth Amendment guarantees no less. The right to counsel of one's choice should not be shackled by cutting off access to the information needed to make that choice.

Counts I, II and IV must fail to the extent that they rest on appellant's failure to use only the specified designations authorized by the Addendum.

C. Omitting a Disclaimer of Certification

The third and last charge based on appellant's advertisements is that the first two advertisements (Counts I and II) failed to include the disclaimer of "certification of expertise" in "specific areas of practice," required by the Advisory Committee Addendum.

On this record, that requirement should be held unenforcible as an ex post facto law, or for lack of notice that such advertising might be unethical. See In re Ruffalo, 390 U.S. 544, 552 (1968) (White, J., concurring). Appellant seems to be penalized for having shot an apparently legal arrow into the air, only to have it declared unlawful before it returned to earth. Appellant lacked specific notice of the contents of the Addendum when he placed the advertisements, although he was apparently on notice of the new DR 2-101(A)(2). It stated that area-of-practice advertising would be permitted only to the extent that the Advisory Committee gave such permission, i.e., that only the Committee's "designations and definitions" could be used.

But that language gives no notice that the Committee might require a disclaimer. It does not appear to delegate such authority. See Fahey v. Mallonee, 332 U.S. 245 (1947); Currin v. Wallace, 306 U.S. 1 (1939). Appellant was evidently willing to challenge the Committee's judgment as to the sort of "designation" it may dictate, but acquiesced in its disclaimer requirement as soon as he knew of it. It smacks of sandbagging to discipline him for not guessing that the Committee would adopt a requirement ultra vires the power given it by the court.

Many of the issues raised by a state-mandated disclaimer are equally inherent in the question of whether the state may dictate a specific form of words for all descriptions of a lawyer's practice. The additional requirement of a disclaimer of certification has, however, a particularly insidious additional aspect. Because some Missouri lawyers have actually obtained "certification of expertise," the requirement imposes on them the choice of either lying or not advertising their areas of practice. They are certainly treated unequally by the Advisory Committee Addendum, which offers no alternative to the statement that one's listing an area of practice "does not indicate any certification of expertise therein."

The plain purpose of the requirement is to prevent consumers from learning that some Missouri lawyers are certified specialists. The only form of specialty certification that the Addendum allows one to mention is that "under procedures established by the Supreme Court of Missouri," or "pursuant to Supreme Court Rule." Para-

graph I. No such Rule or procedures exist. Thus Missouri only allows Missouri specialists to advertise the state's own specialty certificate, which does not exist, perhaps because it does not exist, although certification as specialists is available to Missouri lawyers from other sources.

Paragraph III of the Addendum, by requiring a disclaimer of certification, implies that certified lawyers are available in Missouri, could the consumer but find them.[2] A consumer who knew of the entire Addendum, including Paragraph I, would be certain that this was so, and would probably avoid lawyers who proclaimed their lack of certified expertise. Thus does the Committee, in Macbeth's words, speak the word of promise to our ear, and break it to our hope.

A litigant may object that a requirement of state law infringing on First Amendment rights is overly broad, although its breadth is not directly related to his circumstances. Schad v. Borough of Mount Ephraim, 101 S.Ct. 2176 (1981). Here the appellant is being disciplined for failing to disclaim certification, which the state refuses to provide him, and which the state also refuses to let him obtain (at least for advertising purposes) from anyone else. That is what is sometimes called Catch-22.

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[2] By analogy, the requirement that a prospectus for unregistered securities disclose that the securities are not registered with the SEC rests upon the fact that such registration is possible, and on the presumption that securities are not offered for sale without it.

The requirement may not be wholly meaningless, but it is far from meaningful. By requiring that what may not, for practical purposes, be advertised, must be disclaimed, The Missouri Bar engages in a highly irrational legal sleight of hand.

If the disclaimer requirement can constitutionally be applied to appellant, it should be struck down. In the context of this case, it appears unsupportable.

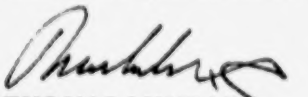
* * *

It thus appears that none of the three charges levelled against appellant's print media advertisements withstands the federal constitutional scrutiny to which the Supreme Court of Missouri declined to subject them. Counts I, II and IV of the Information, composed entirely of those charges, are accordingly as incapable as Count III, the professional announcement charge, of supporting even the private reprimand imposed on appellant by the Missouri Court. That leaves no constitutionally valid basis for the court's judgment.

CONCLUSION

For the foregoing reasons, amicus curiae The Association of Trial Lawyers of America respectfully submits that the judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 1981, true and correct copies of the foregoing Brief for Amicus Curiae, The Association of Trial Lawyers of America, were deposited in the United States Postal Service with first class postage prepaid and properly addressed to the following counsel for parties to this appeal:

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I also certify that all parties required to be served have been so served.

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